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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE THOMAS WHELAN)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JONATHAN ASTORGA MADRIGA,

Defendant.

Case No. 07-CR-3270 BTM

Date: March 10, 2008
Time: 2:00 P.M.

STATEMENT OF FACTS AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANT'S
MOTION

STATEMENT OF FACTS

The following statement of facts is based, in part, on materials received from the government. The facts alleged in these motions are subject to amplification and/or modification at the time these motions are heard. Defendant in no way admits the truth of the facts alleged in the complaint. The complaint alleges that on or about November 13, 2008, defendant did knowingly and intentionally bring into the United States aliens for the purpose of financial gain.

II

MOTION TO COMPEL DISCOVERY

Defense counsel has received some discovery in this case. However, because Mr. Jonathan Astorga Madrigal believes that there may be other discovery outstanding, he moves for the production by the government of the following items. This request is not limited to those items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any "closely related investigative [or other] agencies" under United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989):

(1) The Defendant's Statements Under Fed. R. Crim. P. 16(a)(1)(A) the defendant is entitled to disclosure all copies of any written or recorded statements made by the defendant; the substance of any statements made by the defendant which the government intends to offer in evidence at trial; any recorded testimony of the defendant before the grand jury; any response by the defendant to interrogation; the substance of any oral statements which the government intends to introduce at trial, and any written summaries of the defendant's oral statements contained in the handwritten notes of the government agent; any response to any Miranda warnings which may have been given to the defendant (See United States v. McElroy, 697 F.2d 459 (2d Cir. 1982)); and any other statements by the defendant that are discoverable under Fed. R. Crim. P. 16(a)(1)(A). The Advisory Committee Notes as well as the 1991 amendments to Rule 16 make it clear that the Government must reveal all the defendant's statements, whether oral or written regardless of whether the Government intends to introduce those statements;

1 (2) Arrest Reports, Notes and Dispatch Tapes The defendant
2 also specifically requests that all arrest reports, notes and
3 dispatch or any other tapes that relate to the circumstances
4 surrounding his arrest or any questioning, if such reports have not
5 already been produced in their entirety, be turned over to him. This
6 request includes, but is not limited to, any rough notes, records,
7 reports, transcripts or other documents in which statements of the
8 defendant or any other discoverable material is contained. This is
9 all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v.
10 Maryland, 373 U.S. 83 (1963). See also United States v. Johnson, 525
11 F.2d 999 (2d Cir. 1975); United States v. Lewis, 511 F.2d 798 (D.C.
12 Cir. 1975); United States v. Pilnick, 267 F. Supp. 791 (S.D.N.Y.
13 1967); Loux v. United States, 389 F.2d 911 (9th Cir. 1968). Arrest
14 reports, investigator's notes, memos from arresting officers,
15 dispatch tapes, sworn statements, and prosecution reports pertaining
16 to the defendant are available under Fed. R. Crim. P. 16(a)(1)(B) and
17 ©, Fed. R. Crim. P. 26.2 and 12(I);

18 (3) Brady Material The defendant requests all documents,
19 statements, agents' reports, and tangible evidence favorable to the
20 defendant on the issue of guilt and/or which affects the credibility
21 of the government's case. Impeachment as well as exculpatory
22 evidence falls within Brady's definition of evidence favorable to the
23 accused. United States v. Bagley, 473 U.S. 667 (1985); United States
24 v. Agurs, 427 U.S. 97 (1976);

25 (4) Any Information that May Result in a Lower Sentence under
26 the United States Sentencing Guidelines (U.S.S.G.) As discussed
27 above, this information is discoverable under Brady v. Maryland, 373
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1 U.S. 83 (1963). This request includes any cooperation or attempted
2 cooperation by the defendant, as well as any information that could
3 affect any base offense level or specific offense characteristic
4 under Chapter Two of the U.S.S.G. Also included in this request is
5 any information relevant to a Chapter Three adjustment, a
6 determination of the defendant's criminal history, or any other
7 application of the U.S.S.G.;

8 (5) The Defendant's Prior Record Evidence of prior record is
9 available under Fed. R. Crim. P. 16(a)(1)(B);

10 (6) Any Proposed 404(b) Evidence Evidence of prior similar acts
11 is discoverable under Fed. R. Crim. P. 16(a)(1)© and Fed. R. Evid.
12 404(b) and 609. In addition, under Fed. R. Evid. 404(b), "upon
13 request of the accused, the prosecution . . . shall provide
14 reasonable notice in advance of trial . . . of the general nature .
15 . ." of any evidence the government proposes to introduce under Fed.
16 R. Evid. 404(b) at trial. The defendant requests that such notice be
17 given three weeks before trial in order to give the defense time to
18 adequately investigate and prepare for trial;

19 (7) Evidence Seized Evidence seized as a result of any search,
20 either warrantless or with a warrant, is discoverable under Fed. R.
21 Crim. P. 16(a)(1)©;

22 (8) Request for Preservation of Evidence The defendant
23 specifically requests that all dispatch tapes or any other physical
24 evidence that may be destroyed, lost, or otherwise put out of the
25 possession, custody, or care of the government and which relate to
26 the arrest or the events leading to the arrest in this case be
27 preserved. This request includes, but is not limited to, any
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1 evidence seized from any third party. It is requested that the
2 government be ordered to question all the agencies and individuals
3 involved in the prosecution and investigation of this case to
4 determine if such evidence exists, and if it does exist, to inform
5 those parties to preserve any such evidence;

6 (10) Tangible Objects The defendant requests, under Fed. R.
7 Crim. P. 16(a)(2)©, the opportunity to inspect and copy as well as
8 test, if necessary, all other documents and tangible objects,
9 including photographs, books, papers, documents, photographs, of
10 building or places or copies of portions thereof which are material
11 to the defense or intended for use in the government's case-in-chief,
12 or were obtained from or belong to the defendant;

13 (11) Evidence of Bias or Motive to Lie The defendant requests
14 any evidence that any prospective government witness is biased or
15 prejudiced against the defendant, or has a motive to falsify or
16 distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39
17 (1987); United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988);

18 (12) Impeachment Evidence The defendant requests any evidence
19 that any prospective government witness has engaged in any criminal
20 act, whether or not resulting in a conviction, and whether any
21 witness has made a statement favorable to the defendant. See Fed. R.
22 Evid. 608, 609 and 613. Such evidence is discoverable under Brady v.
23 Maryland, supra. See, United States v. Strifler, 851 F.2d 1197 (9th
24 Cir. 1988) (witness' prior record); Thomas v. United States, 343 F.2d
25 49 (9th Cir. 1965) (evidence that detracts from a witness'
26 credibility);

27 (13) Evidence of Criminal Investigation of Any Government
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1 Witness The defendant requests any evidence that any prospective
2 witness is under investigation by federal, state or local authorities
3 for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d
4 Cir.) cert. denied, 474 U.S. 945 (1985);

5 (14) Evidence Affecting Perception, Recollection, Ability to
6 Communicate, or Truth Telling The defense requests any evidence,
7 including any medical or psychiatric report or evaluation, tending to
8 show that any prospective witness' ability to perceive, remember,
9 communicate, or tell the truth is impaired; and any evidence that a
10 witness has ever used narcotics or other controlled substance, or has
11 ever been an alcoholic. United States v. Strifler, 851 F.2d 1197
12 (9th Cir. 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th
13 Cir. 1980);

14 (15) Witness Addresses The defendant requests the name and last
15 known address of each prospective government witness. See United
16 States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States v.
17 Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government
18 witnesses by counsel is ineffective); United States v. Cook, 608 F.2d
19 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to
20 witnesses). The defendant also requests the name and last known
21 address of every witness to the crime or crimes charged (or any of
22 the overt acts committed in furtherance thereof) who will not be
23 called as a government witness. United States v. Cadet, 727 F.2d
24 1453 (9th Cir. 1984);

25 (16) Name of Witnesses Favorable to the Defendant The defendant
26 requests the name of any witness who made an arguably favorable
27 statement concerning the defendant or who could not identify him or
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1 who was unsure of his identity, or participation in the crime
2 charged. Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis
3 v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980); Jones v. Jago,
4 575 F.2d 1164, 1168 (6th Cir.), cert. denied, 439 U.S. 883 (1978);
5 Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied, 444
6 U.S. 1086 (1980);

7 (17) Statements Relevant to the Defense The defendant requests
8 disclosure of any statement that may be "relevant to any possible
9 defense or contention" that he might assert. United States v.
10 Bailleaux, 685 F.2d 1105 (9th Cir. 1982);

11 (18) Jencks Act Material The defense requests all material to
12 which defendant is entitled pursuant to the Jencks Act, 18 U.S.C. §
13 3500, reasonably in advance of trial, including dispatch tapes. A
14 verbal acknowledgment that "rough" notes constitute an accurate
15 account of the witness' interview is sufficient for the report or
16 notes to qualify as a statement under §3500(e)(1). Campbell v. United
17 States, 373 U.S. 487, 490-92 (1963). In United States v. Boshell,
18 952 F.2d 1101 (9th Cir. 1991), the Ninth Circuit held that when an
19 agent goes over interview notes with the subject of the interview the
20 notes are then subject to the Jencks Act. The defense requests pre-
21 trial production of Jencks material to expedite cross-examination and
22 to avoid lengthy recesses during trial;

23 (19) Giglio Information Pursuant to Giglio v. United States,
24 405 U.S. 150 (1972), the defendant requests all statements and/or
25 promises, express or implied, made to any government witnesses, in
26 exchange for their testimony in this case, and all other information
27 which could arguably be used for the impeachment of any government
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1 witnesses;

2 (20) Personnel Records of Government Officers Involved in the
3 Arrest The defendant requests all citizen complaints and other
4 related internal affairs documents involving any of the immigration
5 officers or other law enforcement officers who were involved in the
6 investigation, arrest and interrogation of him, pursuant to Pitchess
7 v. Superior Court, 11 Cal. 3d 531, 539 (1974). Because of the
8 sensitive nature of these documents, defense counsel will not be able
9 to procure them from any other source;

10 (21) Government Examination of Law Enforcement Personnel Files
11 Mr. Jonathan Astorga Madrigal requests that the government examine
12 the personnel files and any other files within its custody, care or
13 control, or which could be obtained by the government, for all
14 testifying witnesses, including testifying officers. Mr. Jonathan
15 Astorga Madrigal requests that these files be reviewed by the
16 government attorney for evidence of perjurious conduct or other like
17 dishonesty, or any other material relevant to impeachment, or any
18 information that is exculpatory, pursuant to its duty under United
19 States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). The obligation to
20 examine files arises by virtue of the defense making a demand for
21 their review: the Ninth Circuit in Henthorn remanded for in camera
22 review of the agents' files because the government failed to examine
23 the files of agents who testified at trial. This Court should
24 therefore order the government to review all such files for all
25 testifying witnesses and turn over any material relevant to
26 impeachment or that is exculpatory to Mr. Juan Rafael Zafra Gomez
27 prior to trial. Mr. Jonathan Astorga Madrigal specifically requests

1 that the prosecutor, not the law enforcement officers, review the
2 files in this case. The duty to review the files, under Henthorn,
3 should be the prosecutor's and not the officers'. Only the
4 prosecutor has the legal knowledge and ethical obligations to fully
5 comply with this request.

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7 III.

8
9 **CONTENTION**

10 Because the defendant has a Sixth Amendment right as well as a
11 due process right to prepare for and engage in a fair trial, we
12 respectfully request this court to order the government to provide
13 the discovery requested.

14 IV.

15
16 **CONCLUSION**

17 For the foregoing reasons, Jonathan Astorga Madrigal
18 respectfully requests that this Court grant these motions.

19 Respectfully submitted,

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23 February 11, 2008:

/s/ Lee Plummer

24 Attorney for Defendant
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